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No. 86-1080

In the Supreme Court of the United States

OCTOBER TERM, 1986

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, PETITIONER

v.

WILLIAM R. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Washington Area Metropolitan Transit Authority may be required to contribute to a statutory workers' compensation fund that assumes part of individual employers' liabilities to workers injured before mid-1982 in certain cases arising in the District of Columbia.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	11
Head Money Cases, 112 U.S. 580 (1884)	9
Helvering v. *Powers*, 293 U.S. 214 (1934)	11
Keever v. *Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987)	3
Lawson v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198 (1949)	4, 18
Malone v. *WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985)	16, 17
Massachusetts v. *United States*, 435 U.S. 444 (1978)	8, 9, 10, 11, 12, 13
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	16
Rambo v. *United States*, 492 F.2d 1060 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976)	14
South Carolina ex rel. Tindal v. *Block*, 717 F.2d 874 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984)	10, 14
Washington Metropolitan Area Transit Authority v. *Johnson*, 467 U.S. 925 (1984)	3, 15, 18
Youakim v. *Miller*, 425 U.S. 231 (1976)	16

Statutes and regulations:

District of Columbia Workmen's Compensation Act, ch. 612, §§ 1-2, 45 Stat. 600	2

Statutes and regulations—Continued: Page

Longshore and Harbor Workers' Compensation Act, Pub. L. No. 98-426, 98 Stat. 1639, 33 U.S.C. (Supp. II) 901 *et seq.* 2
§ 44(c)(2), 33 U.S.C. (Supp. II) 944(c)(2) .. 5
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 901 *et seq.* 2
§ 4, 33 U.S.C. 904 17-18
§ 4(a), 33 U.S.C. 904(a) 3
§ 5, 33 U.S.C. 905 ..... 3, 17-18
§ 7, 33 U.S.C. 907 ..... 3, 4, 16, 18
§ 7(e), 33 U.S.C. 907(e) 4
§ 8, 33 U.S.C. 908 ..... 3, 18
§ 8, 33 U.S.C. (1982 ed.) 908 17
§ 8(f), 33 U.S.C. 908(f) 3, 4, 18
§ 8(f), 33 U.S.C. (1982 ed.) 908(f) 17
§ 8(g), 33 U.S.C. 908(g) 4
§ 9, 33 U.S.C. 909 ..... 3, 18
§ 10(h), 33 U.S.C. 910(h) 4
§ 18(b), 33 U.S.C. (1982 ed.) 918(b) 4
§ 32, 33 U.S.C. 932 8
§ 32(a), 33 U.S.C. 932(a) 3
§ 44, 33 U.S.C. 944 4
§ 44(a), 33 U.S.C. 944(a) 5, 12
§ 44(c)(2), 33 U.S.C. (1982 ed.) 944(c)(2) .. 4-5
§ 44(g), 33 U.S.C. (1982 ed.) 944(g) 5
§ 44(i), 33 U.S.C. 944(i) 7
§ 44(i), 33 U.S.C. (1982 ed.) 944(i) 3
§ 44(j), 33 U.S.C. (1982 ed.) 944(j) 4, 5, 12, 17
Washington Metropolitan Area Transit Authority Interstate Compact, D.C. Code Ann. §§ 1-2431 to 1-2441 (1981) 6
§ 1-1431:
§ 66(e) 17
§ 77 ..... 15, 16, 17
§ 78 ..... 6, 7, 9, 10, 14, 15
§ 80 ..... 6, 16
§ 1-2440 15
Pub. L. No. 89-744, § 5(a), 80 Stat. 1353 15
Pub. L. No. 93-198, 87 Stat. 774 *et seq.* 2

Statutes and regulations—Continued: Page

D.C. Code Ann:
§ 36-301 *et seq.* (1981 & Supp. 1986) 2
§ 36-340 (1981) 4
§§ 36-501 to 36-502 (1973) 2
20 C.F.R.:
Section 701.101(b) (1986) 2
Section 702.146(c) (1982) 5

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 796 F.2d 481. The opinion of the district court (Pet. App. 22a-31a) is reported at 614 F. Supp. 1419.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1986, and rehearing was denied on October 2, 1986 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on December 31, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As presently applicable to injuries to employees occurring on or before July 26, 1982, the District of Columbia Workmen's Compensation Act, ch. 612, §§ 1-2, 45 Stat. 600, formerly codified at D.C. Code Ann. §§ 36-501 to 36-502 (1973) (DCWCA), extends the workers' compensation protection of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 901 *et seq.*, to all employees in the District of Columbia for all work-related injuries or deaths.[1] The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (1982 ed.) 901 *et seq.*, as it continues to be applicable to such injuries, provides injured workers with guaranteed workers' compensation for work-related injuries.[2] Under the Longshoremen's Act, every cov-

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[1] The District of Columbia enacted a new workers' compensation law, D.C. Code Ann. §§ 36-301 *et seq.* (1981 & Supp. 1986), pursuant to "home rule" authority granted to the District of Columbia by Pub. L. No. 93-198, 87 Stat. 774 *et seq.* As it deals with the issues raised here, the new law is generally similar to the Longshoremen's Act. While the new law became effective on July 26, 1982, for injuries after that date, employers continue to be liable for injuries arising out of work before that date under the earlier DCWCA. See Pet. App. 3a; 20 C.F.R. 701.101(b) (1986). The "special fund" obligation which is the subject of this case pertains to a fund used only to pay claims which arose before the effective date of the new law.

[2] The Longshoremen's and Harbor Workers' Compensation Act was amended in 1984 by Pub. L. No. 98-426, 98 Stat. 1639 *et seq.*, and retitled the Longshore and Harbor Workers' Compensation Act (33 U.S.C. (Supp. II) 901 *et seq.*). The provisions of the Longshoremen's Act, as they existed in 1982, continue to apply to claims derived from injuries occurring before the effective date of the 1982 D.C. law. *Keener* v. *Washington Metropolitan Area Transit Authority*, 800 F.2d

ered employer is "liable for and shall secure the payment to his employees of [workers'] compensation." 33 U.S.C. 904(a). An employer "secures" compensation either by purchasing an insurance policy or by obtaining permission from the Secretary of Labor to self-insure (33 U.S.C. 932(a); *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. 925, 928 (1984)).[3] In exchange for securing compensation—so that injured employees obtain the statutory disability compensation and other benefits—the employer is immune from employee tort suits for work-related injuries. See 33 U.S.C. 905, 907, 908, 909.

The Longshoremen's Act prescribes the amount of compensation to be paid for four classes of disability based on the extent and permanence of the disability. 33 U.S.C. 908. The Act also limits the amount the employer must pay in "second injury" cases—that is, where a partially disabled worker sustains an employment-related injury and the extent of the resulting permanent disability is greater than would have resulted absent the pre-existing disability, 33 U.S.C. 908(f).[4] After the employer has paid compensation

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1173, 1175 (D.C. Cir. 1986), cert. denied, No. 86-1181 (Mar. 9, 1987). Therefore, like petitioner, we refer here to the pre-amendment Longshoremen's Act. However, if a specific section of that Act has been changed by the 1984 Longshore Act, we have so indicated by including the year in the citation (*e.g.*, 33 U.S.C. (1982 ed.) 944(i)).

[3] Petitioner has been self-insured under 33 U.S.C. 932(a) since 1973 (Pet. App. 24a). Hereafter, references to "employers" include the approved insurance carriers of those employers who are not self-insured.

[4] As petitioner explains (Pet. 18-19), if a person who had lost one eye in an earlier accident lost his other eye in a

for—typically—104 weeks of permanent disability,[5] the remainder of the compensation due for the permanent disability is paid out of a "special fund" established by 33 U.S.C. 944.[6] 33 U.S.C. 908(f).

The special fund's primary intended purpose is to minimize any disincentive for employers to hire disabled workers by eliminating the risk that the employer will have to bear all of the worker's loss from a work-related injury sustained while in that employer's service. See *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 202 (1949).[7] The special fund spreads the cost of relieving employers of full liability in second injury cases; it is financed in major part by contributions from employers subject to the Act, according to pro-rated assessments made by the Secretary of Labor. 33 U.S.C. (1982 ed.) 944(c)

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second accident, he would then be entitled to disability compensation due a blind person, considerably greater than that due for loss of one eye.

[5] The employer pays all compensation for the disability during any period of medical recovery (33 U.S.C. 908(f)), and pays medical benefits indefinitely (33 U.S.C. 907).

[6] The new District of Columbia workers' compensation law (see note 1, *supra*) establishes a new "special fund" for injuries occurring after its effective date of July 26, 1982. D.C. Code Ann. § 36-340 (1981).

[7] Approximately 90 percent of the monies in the special fund are spent on compensation for second injury victims (Pet. App. 3a). Other payments from the fund include (33 U.S.C. (1982 ed.) 944(j)): (1) inflation-indexed increases in compensation for pre-1972 injuries or deaths (33 U.S.C. 910(h)); (2) medical examinations (33 U.S.C. 907(e)); (3) defaults in payment due to employer insolvency (33 U.S.C. (1982 ed.) 918(b)); and (4) additional compensation for injured workers undergoing vocational rehabilitation (33 U.S.C. 908(g)).

(2).[8] The amount of each employer's contribution is based upon a formula set out in Section 44(c)(2) and 20 C.F.R. 702.146(c) (1982). Pet. App. 4a. After first estimating the expenses of the fund for the coming year, the Secretary of Labor calculates for each employer the ratio of: (1) its direct payments[9] under the Act made during the previous year; and (2) the total direct payments made under the Act by *all* employers during the same period. Each employer's contribution to the special fund is then set at the calculated fraction of the total estimated fund liabilities for the upcoming year, so that each bears the same proportionate share of projected special fund liabilities as that employer's share of the total direct compensation liabilities for the previous year. Pet. App. 4a; 20 C.F.R. 702.146(c) (1982).

The special fund is segregated from general revenues: "all monies and securities in such fund shall be held in trust by [the] Treasurer [of the United States] and shall not be money or property of the United States" (33 U.S.C. 944(a)). Further, neither the United States nor the Secretary of Labor is liable for payments in amounts greater than the proceeds contained in the fund (33 U.S.C. (1982 ed.) 944 (g)), and payments may be made only for purposes specified in the Longshoremen's Act itself (33 U.S.C. (1982 ed.) 944 (j)).

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[8] The 1984 Longshore Act amendments make some changes, not applicable here, in the methods for calculating contributions to the fund (see 33 U.S.C. (Supp. II) 944(c)(2); note 2, *supra*).

[9] These direct payments are the compensation that the employer has itself paid to injured workers (see 33 U.S.C. (1982 ed.) 944(c)(2)), apart from the liabilities assumed by the special fund.

2. Petitioner, Washington Metropolitan Area Transit Authority (WMATA), is an agency established by an interstate compact entered into by the District of Columbia, Maryland and Virginia [10] to operate a rapid transit system and other public transportation facilities and services in the Washington, D.C. area. Pet. App. 22a. Under the WMATA Compact, petitioner is liable for torts committed by its employees and agents in the conduct of any proprietary function. WMATA Compact, Section 80. Petitioner has consistently maintained that as an employer in the District of Columbia, it is subject to and covered by the Longshoremen's Act, as extended by the DCWCA, for all work-related injuries sustained by its workers before July 26, 1982. Pet. App. 3a, 23a; Pet. 10. Pursuant to the DCWCA, it has obtained permission to act as a self-insurer (Pet. App. 24a); paid workers' compensation benefits (*id.* at 3a); and asserted its right to the statutory limitation on benefit payments in second injury cases (Pet. 10; Pet. App. 3a).

From 1974 until mid-1982, petitioner paid its contributions to the special fund (Pet. App. 2a, 4a). At that juncture, however, it notified the Secretary that it would no longer make payments into the special fund, and demanded a refund of its payments over the past decade, asserting (*ibid.*) that Section 78 of the WMATA Compact immunizes it from such assessments. That section provides that petitioner shall not be required to pay federal, state, or District of Columbia "taxes or assessments upon any of the property acquired by it * * * or upon its activities in

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[10] Washington Metropolitan Area Transit Authority Interstate Compact, codified as amended at D.C. Code Ann. §§ 1-2431 to 1-2441 (1981).

the operation and maintenance of any transit facilities or upon any revenue therefrom * * *."

The Secretary has continued to make payments from the special fund to injured WMATA employees. In 1984 these payments were approximately $446,000. Pet. App. 10a n.7.

3. The Secretary of Labor commenced this action to collect the overdue contributions from petitioner (see 33 U.S.C. 944(i)), and petitioner counterclaimed for a refund of its past special fund contributions.[11] The district court granted summary judgment for the Secretary, holding that the WMATA Compact tax exemption does not include petitioner's contributions to the special fund. Pet. App. 2a, 22a, 30a. The court reasoned that petitioner's payments to the fund are not taxes within the meaning of Section 78 of the WMATA Compact because they are not intended to finance general public expenses, but rather "to supply a specific fund with a specific purpose." Pet. App. 24a-26a. Further, even if the assessment is viewed as a tax, it is not within the purview of the WMATA Compact exemption because it is not a tax on petitioner's "property, activities [or] revenues," the categories to which Section 78 of the Compact limits the exemption. Pet. App. 26a-27a. The court noted that "Congress easily could have provided a blanket exemption but chose not to do so." *Id.* at 27a.

The district court observed that to exempt petitioner from contributing to the special fund would be inconsistent with congressional policy, since the purpose of the fund is to spread second injury costs

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[11] Petitioner's obligation to make payment under the new D.C. workers' compensation law, applicable to injuries occurring on or after July 26, 1982, is not an issue in this case.

among all covered employers. Thus, "[a]ll the other participants' liabilities are increased due to WMATA's refusal to pay * * * [and] WMATA's refusal is in contravention of the statutory requirement that * * * 'the employer shall secure the payment of compensation'" (Pet. App. 29a-30a (quoting 33 U.S.C. 932; emphasis omitted)).

4. The court of appeals affirmed, holding that petitioner "enjoys neither constitutional nor compact immunity from the obligation to make payments to the Fund" (Pet. App. 2a). Petitioner is not entitled to constitutional intergovernmental tax immunity because the special fund is a user fee rather than a prohibited tax under the definition of user fee set out in *Massachusetts* v. *United States*, 435 U.S. 444 (1978). Pet. App. 2a-3a, 6a-7a. In that decision's language joined by a majority of the Court, "a State can have no constitutional objection to a revenue measure * * * [s]o long as the charges do not discriminate against state functions, are based on a fair approximation of use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits to be supplied" (435 U.S. at 466-467).

The court noted (Pet. App. 8a-9a) that petitioner made no contention as to the two aspects of this test concerning discrimination against state functions and assessment of excessive contributions. Petitioner's only contention was that there was no "fair approximation" of its share of the cost, because its contributions exceeded the payout to its injured employees. Noting that the statistics upon which petitioner based this claim were so ambiguous that there was "some doubt about [the claim's] accuracy * * * as a factual matter" (Pet. App. 9a & n.7), the court

concluded that in any event, the *Massachusetts* test was satisfied. It reasoned that the method used in determining an employer's contribution to the fund is rationally designed to approximate prospective payments by the fund to petitioner's employees (Pet. App. 10a), and thus "bear[s] a fair relation to the benefit" received by petitioner (*id.* at 10a-11a). According to the court, employers who made greater direct payments in the previous year are likely to be those having "more employees, more handicapped employees, less safe working conditions, or some combination of these three characteristics." *Id.* at 11a-12a. Moreover, the court observed, petitioner, like other employers, receives indirect benefits from the fund over and above actual payouts to its workers, including freedom from tort liability, more productive employees, and the increased incentive to other employers to hire partially disabled former WMATA workers, thus reducing petitioner's compensation costs. *Ibid.*

The court of appeals also concluded that petitioner's payment to the special fund "is properly regarded not as a tax from which [Section 78 of] the Compact exempts WMATA, but as a fee attendant to regulation." Pet. App. 6a-7a. Analyzing the language of Section 78, the court concluded that "a levy is properly defined as a 'tax' within the meaning of [that provision] when its principal purpose is to raise revenue, not to regulate activities" (Pet. App. 15a). The court noted the distinction between money raised for the general support of the government and money raised for the uses of a particular regulatory statute, citing, inter alia, the *Head Money Cases*, 112 U.S. 580 (1884), and quoted the observation in *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 887 (4th Cir.

1983), cert. denied, 465 U.S. 1080 (1984), that "[i]f regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax" (Pet. App. 16a). Since the central purpose of the workers' compensation scheme, of which the special fund is an integral part, is to determine and assure prompt payment of employers' liabilities for industrial accidents, it concluded that the employer contributions to the fund are more like tort awards than revenue-raising taxes. *Id.* at 16a-17a.

ARGUMENT

The issues presented by this case are, first, whether the contributions due from petitioner to the special fund fairly approximate the benefits it receives therefrom, so that there is no constitutional immunity under *Massachusetts* v. *United States*, *supra*; and second, whether Section 78 of the WMATA compact relieves petitioner of the obligation to contribute. Neither issue merits review by this Court. The disputed questions concern only the participants in the WMATA Compact, and even they are affected only as to compensation payable to individuals who were injured before July 26, 1982.[12] In any event, review is not merited because the courts below correctly rejected petitioner's claims.

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[12] As petitioner notes (Pet. 22 n.4), the Longshore Act employs a somewhat different formula for determining special fund assessments. Accordingly, a decision in this case would not be directly applicable to similar issues that might arise under that Act. Moreover, the new District of Columbia workers' compensation statute is also somewhat different than the statutes involved here (see note 1, *supra*); questions concerning the scope and applicability of that statute should be resolved in a case arising under it.

1. States have no immunity from nondiscriminatory revenue measures that operate as user fees, since such measures do not threaten state sovereignty, but "operate[] only to ensure that each member of a class of special beneficiaries of a federal program pay[s] a reasonable approximation of its fair share of the cost of the program to the National Government" (*Massachusetts* v. *United States*, 435 U.S. at 454 (plurality opinion)). Petitioner's contribution to the special fund is clearly such a permissible user fee.[13] In this Court (Pet. 29), as below (Pet. App. 8a-9a) petitioner does not dispute that the special fund contribution system does not discriminate against state functions, and is designed to produce total revenues that equate with the total federal expenditures (see page 5, *supra*). Petitioner asserts only that the *Massachusetts* test is not satisfied because the amounts petitioner is required to contribute are said to exceed

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[13] The court of appeals therefore found it unnecessary to consider other possible bases for rejecting petitioner's constitutional claim. It did, however, note (Pet. App. 7a n.6) that there is some uncertainty as to "whether the doctrine of state immunity from federal taxation retains any substantive content at all." Assuming it does, this Court has held in *Helvering* v. *Powers*, 293 U.S. 214 (1934), that the operation of a street railway is a proprietary function, and such functions have traditionally been held to be outside the scope of the state's immunity from taxation. We submit that since *Massachusetts* v. *United States*, *supra*, so plainly indicates that petitioner is entitled to no constitutional immunity because the challenged contributions are in the nature of user fees, there is no more need for this Court than for the court of appeals to consider in this case whether the state tax immunity doctrine survives, and if so, whether the distinction between "proprietary" and "essential" governmental functions remains relevant. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 539-545 (1985).

greatly the payouts to former WMATA employees (Pet. 29).[14] The accuracy of petitioner's analysis of the costs and benefits that have resulted from its participation in the scheme is highly questionable.[15] Assuming it is accurate, that analysis does not show a lack of "fair approximation" under the *Massachusetts* test.

The calculation of contributions based on the proportion of each employer's direct payments for the previous year is at least as closely related to the benefits that each employer can reasonably anticipate from the fund as the flat, weight-based aircraft registration fee was related to the civil aviation benefits in *Massachusetts* (435 U.S. at 446). And here, as there, "[a] more precisely calibrated formula * * * would, of course, be administratively more costly" (*id.* at 469). Compare Pet. App. 10a-12a. As the court of appeals noted (*id.* at 11a), the funding method selected can be expected to result in larger contributions to the fund by larger employers, and

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[14] Petitioner also suggests in passing (Pet. 29) that there is no limit on the purposes to which its contributions may be applied. This is plainly incorrect: the special fund is segregated from general revenues (33 U.S.C. 944(a)), and payments therefrom may be made only for the purposes specified in the Longshoremen's Act itself (33 U.S.C. (1982 ed.) 944(j)).

[15] In the first place, as the court below noted (Pet. App. 9a-10a n.7), the statistical basis for petitioner's claim is highly speculative—it may well be that the payouts to former WMATA employees have been substantially greater than petitioner assumes. In the second place, petitioner's argument ignores the fact that it receives other benefits from its participation in the fund beyond payouts to former employees—including, for example, protection from possible very large tort liability (Pet. App. 12a).

those with more vulnerable workers—precisely those employers that can also be expected to require the largest payouts from the fund.

Petitioner claims (Pet. 11, 17) that its contributions to the fund will necessarily rise as other employers settle pre-1982 injury claims, thus reducing their direct payouts and therefore their contributions to the fund. Even if petitioner is correct in predicting that other employers, but not petitioner, will settle cases and reduce their direct payments, that does not establish such an absence of relationship between costs and benefits that the contributions must be considered an unconstitutional tax rather than a user fee.

This statutory scheme, especially with its decreasing pool of beneficiaries suffering from pre-1982 injuries, and correspondingly decreasing fund payouts, simply poses no threat of the imposition of charges that will "unduly interfere with, or destroy a State's ability to perform essential services" (*Massachusetts*, 435 U.S. at 467 (language joined by majority of Court)).[16]

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[16] Petitioner makes much of the economic burden imposed by the required contribution, but, as the Court noted in *Massachusetts*, 435 U.S. at 465-466:

> a State has no constitutional complaint when it is required to pay the cost of benefits received * * * [and] even if the [system utilized] does cost it somewhat more than it would have to pay under a perfect user-fee system, there is still no interference with the values protected by the implied constitutional tax immunity of the States. The possibility of a slight overcharge is no more offensive to the constitutional structure than is the increase in the cost of essential operations that results either from the fact that those who deal with the State may be required to pay nondiscriminatory taxes on the money they receive or from the fact a jury may award an eminent domain claimant an amount in excess of what would be "just compensation" in an ideal system of justice.

2. Petitioner's contention that the tax exemption in the WMATA Compact excuses it from contributing to the special fund is equally without merit. The court of appeals analyzed the precise language of Section 78 of the Compact to determine the rationale for the tax exemption contained therein, and correctly concluded that the assessed contributions to the special fund do not constitute an exempt "tax or assessment" under that rationale, but are instead fees attendant to regulation.[17]

As the court of appeals explained (Pet. App. 14a-16a), a levy is not a "tax" within the meaning of Section 78 of the WMATA Compact when its primary purpose is to regulate activities, rather than to raise revenue for the general support of the government.[18] See, *e.g.*, *South Carolina ex rel. Tindal* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984),[19] and other cases cited at Pet. App.

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[17] Petitioner apparently believes (Pet. 27-28) that the presence of the term "assessment" in the tax exemption provision should lead to a different result. But as petitioner itself recognizes (Pet. 24, 28), an "assessment" is simply a particular kind of tax. Cf. *Rambo* v. *United States*, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976). It is apparent that the term "assessment" is no broader than the term "tax," either in the Compact or in the cases cited by petitioner.

[18] It makes no difference that second injury funds exist in other states and that other statutes may sometimes characterize the contributions as "taxes" (see Pet. 18-19). It is the true nature of the contributions, not the name given them, that controls.

[19] Petitioner attempts to distinguish *South Carolina ex rel. Tindal* v. *Block*, *supra*, by arguing (Pet. 23-24) that the fee there was tantamount to a penalty. The Fourth Circuit, however, concluded that "[t]he clear language and structure" of the statute showed that the federal assessment on the commercial sale of milk was designed to regulate the production

16a. Section 78 of the Compact states that petitioner is created "for a public purpose" and "[*a*]*ccordingly*, [petitioner] shall not be required to pay taxes or assessments" (emphasis added). The "public purpose" of petitioner provides no basis for exempting it from regulatory fees.

The special fund is an integral part of the overall workers' compensation scheme, the primary purpose of which is to regulate employers' liabilities for industrial accidents. See *Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. at 931-932. As the court below explained (Pet. App. 16a-17a), the workers' compensation scheme also indirectly regulates employer conduct by increasing contributions to the special fund when the employer's proportion of direct compensation liabilities increases.[20] In other words, "fees associated with the statute are better compared with tort awards than with revenue-raising taxes."[21] Pet. App. 17a.[22]

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of milk by reducing overproduction, and by spreading the financial burdens of the price support system. See 717 F.2d at 887.

[20] Petitioner mistakenly asserts (Pet. 21) that an employer's contribution does not depend on its workers' compensation experience. This is merely a variation on its factual argument that the assessment is not a fair approximation of the benefit received. See pages 12-13, *supra*.

[21] Section 5(a) of Pub. L. No. 89-774, 80 Stat. 1353 (codified at D.C. Code Ann. § 1-2440 (1981)), stating that all inconsistent United States or District of Columbia laws are amended to eliminate such inconsistencies, adds nothing to petitioner's position (see Pet. 16-17). If the required contributions to the special fund are not taxes within the meaning of the tax exemption section, there is no inconsistency between the Compact and federal or District of Columbia laws.

[22] Petitioner also asserts that it is excused from payment by Section 77 of the Compact. That section exempts petitioner

3. Finally, strong considerations of equity support the result reached below. Petitioner's payment into the special fund is the quid pro quo for its relief from

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from "all laws, rules, regulations and orders of the signatories and of the United States otherwise applicable * * * except that laws, rules, regulations and orders relating to inspection of equipment and facilities, safety and testing shall remain in force and effect." Since petitioner never claimed exemption on the basis of that section in the courts below, the applicability of Section 77 to the particular facts of this case was not considered, and ought not to be reviewed by this Court. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975) ("without a lower court opinion on the legal issue * * * we normally decline to consider a legal claim," citing cases); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court," citing cases).

This claim is, in any event, without merit. The Section 77 exemption expressly does not apply to state and federal rules and regulations relating to inspection, safety, and testing; as the court of appeals explained (Pet. App. 16a-17a), the workers' compensation scheme, including the special fund provision, "indirectly regulates employers' conduct by holding them accountable for accidents"; it thus contributes to the safety not only of employees, but also of members of the public who use petitioner's facilities. The legislative history of Section 7 suggests it was designed to make WMATA's revenue bonds saleable by assuring its independence "with respect to fares, service and other activities which affect net revenues" (*Malone* v. *WMATA*, 622 F. Supp. 1422, 1428-1429 (E.D. Va. 1985) (quoting testimony of Jerome Alper, counsel to drafters of WMATA Compact)). That purpose would not be served by exempting petitioner from workers' compensation laws, and thus exposing it to the risk of potentially enormous, and largely unpredictable, tort liability for accidental injuries or death of employees. Moreover, Section 80 of the Compact establishes that petitioner "shall be liable for its contracts and its torts." Petitioner has always maintained that it is covered by the Longshoremen's Act, thereby achieving the substitute for tort liability provided by the Act,

the obligation to pay full workers' compensation benefits to its employees who suffer second injuries, and more fundamentally, for its relief from potential tort liability for its employees' injuries.

Petitioner seriously mischaracterizes the role of the special fund in the statutory workers' compensation scheme, when it contends (Pet. 17-20) that the special fund has no role as a substitute for tort liability. Section 8 of the Longshoremen's Act, 33 U.S.C. (1982 ed.) 908, defines the amount of compensation to be paid for different degrees of disability. Section 8(f), 33 U.S.C. (1982 ed.) 908(f), also relieves the employer from part of the compensation it would otherwise have to pay in "second injury" cases, transferring to the special fund, after 104 weeks, payment of the remaining disability compensation for which the employer would otherwise be responsible. See pages 3-4; *supra*. See also 33 U.S.C. (1982 ed.) 944(j). Sec-

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so that any claim of exemption from regulation is inconsistent with its own conduct. *Malone* v. *WMATA*, 622 F. Supp. 1422 (E.D. Va. 1985), which petitioner cites for the proposition that it is broadly exempt from regulation (Pet. 12-13), observes that petitioner's compliance with the Virginia workmen's compensation laws "has no bearing on" whether other forms of regulation are precluded by Section 77 because the state workmen's compensation statute "is basically a tort statute which under Section 80 the authority [petitioner] has acknowledged it will honor." 622 F. Supp. at 1429 n.10. Finally, Section 66(e) of the Compact expressly provides that employees of private transportation systems acquired by petitioner shall not be "placed in any worse position with respect to workmen's compensation" as a result of the transfer of their employment to petitioner. Those employees thus continue to be covered by workmen's compensation. It would be impractical and inequitable to have such coverage turn on the individual's employment history; Section 66(e) thus strongly suggests that all petitioner's employees are covered.

tions 4 and 5, 33 U.S.C. 904, 905, guarantee that payments under Section 8, as well as Sections 7 and 9 (see page 3, *supra*), will be made to the injured employee irrespective of the employer's fault and, in exchange, provide that such payments are the employee's exclusive remedy against the employer. This substitution of guaranteed compensation for tort responsibility, the "compromise at the heart of workers' compensation" (*Washington Metropolitan Area Transit Authority* v. *Johnson*, 467 U.S. at 932), applies to the entire period of disability compensation to which the worker is entitled, regardless of whether the payments are made by the specific employer for whom the employee worked at the time of the disabling work-related injury, or by the special fund under the transfer of payment provisions of Section 8(f). After the 104-week period, the disabled employee remains entitled to payments and the employer remains immune from a tort suit. The purpose of the Section 8(f) transfer of payment to the special fund is simply to spread the cost of full statutory compensation for "second injuries" among all employers having workers' compensation liabilities under the Act, so that employers will not refuse to hire a disabled worker out of fear that the worker's existing disability will lead to inordinate compensation liabilities in the event of a later accident. Pet. App. 4a; see *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. at 201-202.

Absent these interconnected provisions, petitioner would be liable for all torts committed in the operation of its transit system resulting in personal injury to its workers. Since petitioner accepts the statutory release of its tort liability for pre-July 26, 1982, industrial injuries, including the Section 8(f) limitation of its obligation to pay in "second injury" cases,

it cannot escape its attendant obligation to pay its share of the expenses of compensating these "second injury" workers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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